SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 359

ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., PETITIONING CREDITORS, AND W. A. FULLER, RECEIVER FOR S. YOSHINUMA, BANKRUPT,

Petitioners,

vs.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on June 25, 1943. An order was signed on July 14, 1943 by Honorable J. C. Hutcheson, Jr., United States Judge, staying the issuance of the mandate of the Circuit Court of Appeals for thirty days from the date of said order to enable appellants to apply for and to obtain the writ of certiorari herein sought. A further stay of the mandate until September 23, 1943 was granted by order passed August 30, 1943. The jurisdiction of this

Court is invoked under Sec. 240 (a) of the Judicial Code as amended.

Specifications of Error.

1. The Circuit Court of Appeals erred in not holding that the State Court insolvency proceedings, tantamount to bankruptcy, were superseded by bankruptcy whether instituted within or more than four months before bankruptcy.

2. The Circuit Court of Appeals erred in holding that the State Court proceedings, brought more than four months before bankruptcy, were not insolvency proceedings but were for the enforcement of an existing lien.

This finding was erroneous because the State Court proceedings were in fact and effect insolvency proceedings, having all the allegations, indicia and prayers of such a proceeding, and the aid sought for the nominal judgment involved, (a total of $276.50) was purely incidental to the main and real purpose of the bill.

This finding was erroneous because the State Court bill was an insolvency proceeding "tantamount to bankruptcy" because it provided for an administration of the insolvent debtor's assets and a winding up of his affairs similar to that provided by the national act; and such proceedings "are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before". *Straton* v. *New*, 283 U. S. 327, 75 L. Ed. 1098.

3. The Circuit Court of Appeals erred in holding (inferentially from the authorities cited in the opinion, though not in precise language) that the state court insolvency proceedings were not superseded by bankruptcy because not based upon a State Statute which attempts to give an insolvent debtor a discharge.

This finding was erroneous because all the elements of an insolvency proceeding were present, that is, the petition

and prayers for a receiver for an insolvent debtor; the conservation and administration of the debtor's assets; the sale of said assets; the winding up of his affairs similar to that provided in the National Bankruptcy Act; and the division of his assets among his creditors.

4. The Circuit Court of Appeals erred in holding that appellants were not entitled to the turn-over order sought by them.

Applicable Law.

We have cited in our petition herein decisions showing the conflict between the decision under review and the applicable decisions of the Supreme Court and other Circuit Courts of Appeal, and the Supreme Court of Georgia.

The State Court Bill Was a Creditors' Insolvency Proceeding

The general character of the State Court bill was that of a creditors' bill. The main purpose was to obtain the relief appropriate only in insolvency proceedings, and the fact that aid was sought for plaintiff's small judgment lien does not save the case from the nullifying effect of bankruptcy on pending state insolvency proceedings.

In re *Merry, Trustee,* v. *Jones, Receiver,* 119 Ga. 643, quoted in our petition, the Supreme Court of Georgia says:

> "1. Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy.
>
> 2. *But where the main purpose of the petition is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident therein will not save the case from the nullifying effect of bankruptcy on pending State insolvency proceedings.* (Emphasis ours.)

3. In the present case, the mortgage does not appear in the record, the pleadings do not describe the mortgaged property, and there is no prayer for a foreclosure. The prayers, to marshal the assets, to enjoin other creditors from proceeding except in such suit, and to appoint a receiver to take charge of all the property of the defendant, are adjusted to insolvency proceedings, and not to the foreclosure of a mortgage."

The State Court bill was an insolvency proceeding "tantamount to bankruptcy" because it provided for an administration of the insolvent debtor's assets and a winding up of his affairs similar to that provided by the national act; and such proceedings "are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before". *Straton* v. *New,* 283 U. S. 327, 75 L. Ed. 1098.

See also the case of *Bank of Andrews, et al.,* v. *Gudger,* 212 Fed. 49 (3) (C. C. A. Fourth Circuit) quoted in our petition; and the dissenting opinion of Judge Sibley in re *Rutledge* v. *Bristol,* 65 F. (2d), on page 988, also quoted in our petition.

A State Court Insolvency Proceeding May Be Tantamount to Bankruptcy Without Being Based Upon a State Court Statute Providing for a Discharge.

In the opinion, the Circuit Court of Appeals quotes several cases, one or two of which seem to hold that for a state court proceeding to be superseded by bankruptcy, it must be based upon a State Statute which attempts to give an insolvent debtor a discharge.

But a state court proceeding can be *tantamount* to bankruptcy, that is, of the general character of bankruptcy, without the discharge provisions. If all the other elements of an insolvency proceeding are present, that is—the petition and prayers for the appointment of a receiver for an insolvent debtor, the conservation and administration of

the debtor's assets, the sale of said assets and the winding up of his affairs similar to that provided in the national bankruptcy act, and the division of his assets among his creditors;—it is not necessary that the proceedings in the state court be based upon a statute that undertakes to provide for a discharge.

As stated in the petition, no such condition precedent is stated by the Supreme Court of the United States in declaring when state insolvency proceedings are superseded in re: *Straton* v. *New*, 283 U. S. 327, 75 L. Ed. 1098 (*supra*). And in re: *Duparquet Hout and Moneuse Company* v. *Evans*, 297 U. S. 216, 80 L. Ed. 591, Mr. Justice Cardozo, in the opinion on page 595 says:

> "It is common learning that an equity receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross* v. *Irving Trust Company*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605, 90 A. L. R. 1215, 22 Am. Bankr. Rep. (N. S.) 661."

Section 2 (a) (21); U. S. C. A. Title 11, Sec. 11 (a) (21) of the Chandler Act of 1938, Does Not Alter the Law as to the Supersession of State Court Insolvency Proceedings by Bankruptcy.

Section 2 states the powers of courts of bankruptcy, and under Section 2 (a) (21); U. S. C. A. Title 11, Sec. 11 (a) (21), they may:

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the pro-

visions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and account shall not be required, except in proceedings under Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made or the agent was authorized more than four months prior to the date of bankruptcy * * *."

This section is to be construed with the two following sections:

Section 2 (b); U. S. C. A. Title 11, Sec. 11 (b):

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 70 (a); U. S. C. A., Title 11, Sec. 110 (a):

"The trustee of the estate of a bankrupt, and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * * to all his property * * *. The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court."

In *Emil* v. *Hanley, No. 551, October Term, 1942,* decided March 15, 1943 (Law Ed. Adv. OP. Vol. 87, No. 11, page 643), the Supreme Court of the United States says:

"The main purpose of Section 2 (a) (21) was to give the bankruptcy court control over disbursements made in non-bankruptcy proceedings prior to the filing of the petition. The House Judiciary Committee in its report stated: 'There is no logical reason why the bankruptcy court could not supervise these expenditures, since all of the previous proceedings are nullified by the petition in bankruptcy followed by an adjudication. The principle is the same as that involved in Section 60 (d)

of the act where it is provided that fees paid to the attorney for the debtor prior to bankruptcy and in contemplation thereof are subject to review by the bankruptcy court.' H. Rep. No. 1409, *supra*, p. 20. That is as plain an indication as could be made that Section 2 (a) (21) was designed to define the powers of the bankruptcy court only where bankruptcy superseded the prior proceedings."

In footnote 4, immediately following the matter quoted, the court says:

"We do not of course include that supersession which flows from the fact that state insolvency laws are involved which are 'tantamount to bankruptcy'." Here the footnote refers to *Straton* v. *New*, *supra*, page 327.

In the conclusion of the opinion in *Emil* v. *Hanley*, *supra*, the Supreme Court says on page 647:

"Little need be said about Section 69 (d). It must be read in connection with Section 2 (a) (21). The legislative history suggests that it, too, was designed to apply only where bankruptcy superseded the prior proceedings. H. Rep. No. 1409, *supra*, p. 12. As stated by the draftsman, 'It makes clear and certain the exclusive and paramount jurisdiction of the bankruptcy court over property dealt with in a prior equity receivership or like proceedings which is superseded by a bankruptcy proceeding.' Weinstein, op. cit. p. 154. And see 4 Collier, op. cit. pp. 879-882."

This citation to 4 Collier, 879-882 refers to the text discussing Section 69 (d), defining the duties of non-bankruptcy officers after a petition has been filed. In footnote (8), page 882, it says:

"It appears both logical and necessary that such a provision must be read together with the grant of power confined in Section 2 (a) (21). Under Section 2 (a) (21) the bankruptcy court has jurisdiction only over non-bankruptcy liquidation officers, and only where the proceeding or arrangement under which they

> are acting has been instituted within four months of bankruptcy, unless the proceeding was void under State law or was begun under a state statute which in effect is held to be a state insolvency law repugnant to the Bankruptcy Act."

The conclusion, therefore, is that the State Court insolvency proceedings are superseded by the bankruptcy in this case, "whether commenced within four months of bankruptcy or before." To the same effect, see Volume I, Collier on Bankruptcy, 14th (1940) Edition, page 305, where the text referring to non-bankruptcy receivers or trustees says "If, however, the receivership or trusteeship is initiated under a State statute which is in effect a state insolvency law tantamount to bankruptcy legislation, then such receivership will be superseded by bankruptcy, whether or not within the four months' limit prescribed by clause (21), as such proceedings are utterly null and void."

Respectfully submitted,

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